IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-784

STATE OF MARYLAND,

Petitioner,

v.

VICTOR DENNIS MARZULLO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The State of Maryland, Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, reported at 561 F.2d 540 (4th Cir. 1977), is included as Appendix A of this Petition. The Memorandum and Order dated July 14, 1976, of the United States District Court for the District of Maryland, which the Court of Appeals reversed, is unreported and is included as Appendix B to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit, which is sought to be reviewed, was filed on September 2, 1977. This Petition is filed within 90 days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does this Court's decision in *McMann v. Richardson*, 397 U.S. 759 (1970), render inapplicable at all stages of a trial the traditional "farce or mockery" test for determining competency of counsel, still adhered to by four federal judicial circuits, but disregarded by the Fourth Circuit in this case?

2. Should the sometimes impossible burdens of showing competency of counsel and lack of prejudice be placed on the State rather than imposing upon the defendant the reasonable requirement of proving incompetency and prejudice?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Constitution of the United States, Amendment XIV

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No. State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Victor Dennis Marzullo, Respondent, was convicted *v.* on October 10, 1974, by a jury in Circuit Court for Baltimore County (Proctor, J.) of assault with intent to rape and perverted practice. He received concurrent sentences of ten years and five years respectively.

Respondent's convictions were affirmed in *Marzullo v. State*, No. 950 (Md. App., filed May 12, 1975).

Respondent's Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland was denied in *Marzullo v. State*, Misc. No. 199 (Md., filed Aug. 1, 1975).

Respondent was denied relief under the Maryland Uniform Post Conviction Procedure Act in the Circuit Court for Baltimore County (Haile, J.) on September 4, 1975, wherein the question of competency of trial counsel was heard and decided.

Application for Leave to Appeal from this denial of post conviction relief was denied in *Marzullo v. Warden*, Post Conviction No. 71 (Md. App., filed Sept. 24, 1975).

By his Memorandum and Order, a copy of which appears as Appendix B to this Petition, the Honorable Joseph H. Young, presiding in the United States

District Court for the District of Maryland, denied Respondent's Petition for a Writ of Habeas Corpus, finding trial counsel to have been competent. *Marzullo v. State*, No. Y-75-1877 (D. Md., filed July 14, 1976).

Judge Young's decision was reversed in *Marzullo v. State*, 561 F.2d 540 (4th Cir. 1977), not on any ground raised directly by Respondent but solely because the Court of Appeals perceived defense counsel's handling of the jury selection not to have been within the range of competence demanded of attorneys in criminal cases.

In his petition for Writ of Habeas Corpus in the District Court, among numerous other allegations raised, Respondent claimed that his trial counsel was incompetent (for a variety of reasons) and, separately, that it was improper for jury members to be in the courtroom when an unrelated rape indictment against him was dismissed. None of the alleged bases for Respondent's trial counsel being incompetent related to counsel's failure to ask that the prospective veniremen be excluded during the dismissal of the unrelated rape indictment or that the jury in the case that was tried be selected from a different panel.

Respondent had been charged in separate indictments with the unrelated rapes of two women. In the presence of a prospective jury panel, one of the charges was dismissed when the prosecuting witness stated in open court that she could not identify her assailant. At this point, Respondent had not elected a jury trial. He then did so. A jury from the same group of prospective veniremen was chosen after thorough *voir dire* which ascertained on the record that the panel was not affected by having witnessed the dismissal of the other charge.

Nevertheless, because trial counsel for Respondent testified at the post conviction hearing (held one year after the trial) that he did not recall that a jury panel

was present when the first charge was dismissed, the Fourth Circuit, rewriting Respondent's claimed grounds for relief, found that allowing a jury from the same panel to hear the second charge could not have represented a trial tactic and that the inactions of defense counsel deprived Respondent of "reasonably competent" counsel at his trial.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IGNORES *ESTELLE v. WILLIAMS*, 425 U.S. 501 (1976), AND DEPARTS FROM THOSE OF FOUR OTHER CIRCUITS WHICH RECOGNIZE THAT McMANN v. RICHARDSON, 397 U.S. 759 (1970) FURNISHES STANDARDS APPLICABLE TO PLEAS OF GUILTY ONLY, NOT ALL STAGES OF TRIAL.

In *McMann v. Richardson, supra* at 771, in discussing the propriety of defense counsel's advice to enter a plea of guilty, this Court held that criminal defendants "are entitled to the effective assistance of competent counsel," the test for competency in the context of guilty pleas being "whether that advice was within the range of competence demanded of attorneys in criminal cases." In the instant case, the United States Court of Appeal for the Fourth Circuit ignored *Estelle v. Williams, supra,* and purported to apply the *McMann* test; in so doing, it extended *McMann* and disavowed the long established test enunciated in *Root v. Cunningham,* 344 F.2d 1, 3 (4th Cir. 1965), *cert. denied,* 382 U.S. 866 (1965), *i.e.*, "one is deprived of effective assistance of counsel only in those extreme instances where the representation is so transparently inadequate as to make a farce of the trial."

In his original habeas corpus petition in the District Court, Respondent claimed, among other reasons, that his trial counsel was incompetent because he failed

properly to question jurors on *voir dire*. Applying *Root v. Cunningham, supra,* which Petitioner believes should merely be read as *defining the standard for the lower end* of "the range of competence demanded of attorneys in criminal cases," *McMann* at 771, the District Court held:

> "Petitioner further alleges that his attorney was incompetent because he failed to properly question the jury on voir dire, failed to advise him of the number of peremptory challenges available, and that he had unlimited challenges for cause . . . . Petitioner, of course, had 20 peremptory challenges in this case. Since the panel consisted of only 19 prospective jurors petitioner could have eliminated them all if he had had any reason to do so. The record shows the following colloquy concerning the challenges: (Tr. 5)
>
> THE COURT: We are short on jurors. How many have you counted?
>
> THE CLERK: Nineteen, Your Honor, on our panel.
>
> THE COURT: We have 19 jurors. You're entitled, of course, to 20 peremptory challenges which means you won't have any left.
>
> MR. SEIBERT: As far as the State is concerned, Your Honor, we will waive any challenge and take the first 12 jurors.
>
> MR. ARNICK: If Your Honor please, my client advises me he believes we would end up with 12 jurors out of that many even with the challenges.
>
> In any event petitioner relied on his counsel to handle these matters and made no objection at the time. When a client by his actions confesses his inadequacy to handle his case and places himself in counsel's hands he is bound by counsel's decisions. *Williams v. Beto*, 354 F.2d 698, 705-6 (5th Cir. 1966). . . . Counsel are called upon to make decisions such as these throughout the course of a trial and the courts will not second guess counsel on his trial tactics. As the Court held in *United*

> *States v. Rubin*, 443 F.2d 442, 445 (5th Cir. 1970), *cert. denied*, 401 U.S. 945 (1970);
>
> Errors, even egregious ones, in this respect [trial tactics] do not provide a basis for post conviction relief.
>
> Petitioner's real complaint is merely that counsel did not obtain an acquittal on all charges. (P.C. Tr. 83)." Appendix B at 20a-21a.

Independently, and without reference to the adequacy of his defense lawyers, Respondent complained about the presence of the prospective veniremen when an unrelated rape indictment was dismissed. Treating this claim, the District Court held:

> "While the jury members were present in the courtroom the Assistant State's Attorney dismissed another rape indictment against petitioner because the complaining witness could not identify him. Thereafter, on voir dire, Judge Proctor specifically asked the jurors whether or not such knowledge would prevent them from giving petitioner a fair trial. No juror indicated that he or she would be affected in any way by the knowledge of the dismissal. (Tr. 6). Petitioner was clearly entitled to have such questions asked on voir dire. If he were not satisfied with the jurors he had enough peremptory challenges to dismiss them all. In any event he is deemed to have waived any right he may have had to challenge the panel by not presenting his reasons to the trial court and giving that court an opportunity to act. Petitioner and his counsel were aware of the presence of the jurors and made no objection, thereby waiving any right to collateral relief. *See, Estelle v. Williams,* ___ U.S. ___ (1976), No. 74-676 (decided May 3, 1976)."

Contrary to the United States Court of Appeals for the Fourth Circuit, other Circuits have held that the *McMann* rule should be restricted to cases involving guilty pleas since the decision to plead guilty waives all non-jurisdictional defects and should not apply to cases wherein trial tactics or investigative efforts are being

questioned. *See, e.g., Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974), in which the Court noted that "[r]easonably effective assistance is an easier standard to meet in the context of a guilty plea than in a trial. . . ."

Despite the Fourth Circuit's view of *McMann*, the so-called "farce or mockery" test[1] is retained by four federal judicial circuits. *See, e.g., Rickenbacker v. Warden*, 550 F.2d 62 (2d Cir. 1976), wherein there was no reason to abandon the "farce or mockery" standard since counsel's performance would satisfy any proposed test; *United States v. Madrid Ramirez*, 535 F.2d 125 (1st Cir. 1976), wherein the "farce or mockery" test was not discarded because defense counsel was found not to have violated even a "reasonably competent" standard; *United States v. Miramon*, 470 F.2d 1362 (9th Cir. 1972), *cert. denied*, 411 U.S. 934 (1973); *Basker v. Crouse*, 426 F.2d 531 (10th Cir. 1970). The United States Court of Appeals for the Ninth Circuit initially departed from the "farce or mockery" test in *Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir. 1977), but a rehearing, en banc has been ordered in view of the decision of another three-judge panel of the Ninth Circuit in *Saunders v. Eyman*, No. 75-3485 (9th Cir., filed April 18, 1977), wherein the "farce or mockery test" was reaffirmed. *See also deKaplany v. Enomato*, 540 F.2d 975 (9th Cir. 1976).

It is submitted that the broad language used by this Court in *McMann* was not intended as a new or comprehensive test to be utilized in all cases involving the question of the denial of the Sixth Amendment right to assistance of counsel.[2] While this Court did state the

[1] It has been held that the use of the phrase "farce or mockery" is "not to be taken literally, but rather as a vivid description of the principle that the *accused* has a heavy burden in showing requisite unfairness." *Bruce v. United States*, 379 F.2d 113, 116 (D. C. Cir. 1967) (emphasis added).

[2] The overall approach to the question in *McMann* might lead to the conclusion that what was at issue was the denial of the defendant's Fourteenth Amendment right to due process of law in obtaining the advice of reasonably competent counsel before entering a plea of guilty.

test for competency to be "whether that advice was within the range of competence demanded of attorneys in criminal cases", 397 U.S. at 771, it further stated:

> "Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *Id.*

The decision further employed such tests as whether the defendant could demonstrate "gross error" or "serious derelictions" on the part of counsel where he advised the defendant to plead guilty instead of going to trial.

By adopting an across-the-board "reasonable or normal competency" standard, it is suggested that the courts are left with no real test to apply to the many factual conditions which may be presented. We need go no further than the case at bar to see the trap which use of such a generalized standard sets.

Rather than abide by the decision of the District Court (as suggested in *McMann*), the Fourth Circuit found that trial counsel's action could only have prejudicial effect to Respondent without laying any foundation for such a finding in the record below. Although the Court found that trial counsel acted competently in all other aspects of the pre-trial and trial tactics, it found inherent prejudice in counsel's action in allowing the Respondent to go to trial before a jury whose members heard the State dismiss an unrelated charge against Respondent because of a failure in identification. Such action could most surely have been a

well conceived trial tactic,[3] but, because counsel did not recall a year later whether or not the jury panel was present at the time of the dismissal, the appellate court labelled such action as being outside that "range of competence demanded of attorneys in criminal cases," ignoring the conclusion, implicit in the decisions of four other Circuit Courts of Appeals, that *McMann* merely establishes a spectrum of acceptable representation, the lower end of which is defined in *Root*.

The result reached by the Fourth Circuit in the instant case was not that which was intended by the rule in *McMann*. It does not require any stretch of this Court's language and approach in *McMann* to conclude that the standards of the "farce or mockery" test are harmonious thereto and that the general statements in *McMann* did not intend any change.

The Petitioner further submits that, similar to the Second Circuit Court of Appeals' decision in *Rickenbacker v. Warden, supra*, and the First Circuit Court of Appeals' decision in *United States v. Madrid Ramirez, supra,* in the case *sub judice,* there is no reason to abandon the "farce and mockery" standard because defense counsel's performance would satisfy any proposed test. Defense counsel recalled that no jury was present when the first indictment was dismissed. Such testimony should not be equated with an admission that no trial tactics were involved as it represented the recollection of trial counsel a year after the trial took place.[4]

[3] Defense counsel may have reasoned, and correctly so, that if the jurors heard that one victim could not identify the defendant and that the State "confessed" that the Respondent was not guilty in that case, it would be likely that in the minds of the jurors, this would affect the credibility of the victim in the instant case, as well as the State's motivation in charging the Respondent in a second offense.

[4] Logic compels that a jury would not be prejudiced against a defendant against whom some charges had been dropped because of the inability of witnesses to identify him. Both reviewing state courts and the United States District Court for the District of Maryland reached this conclusion. Defense counsel surely then, by inference, has been shown to have been reasonably competent. In any event, Respondent was not prejudiced by trial counsel's conduct.

The statement by the victim in the first rape charge could only affect the element of identification. Respondent's identity, however, was not in issue as he testified to driving the victim around before parking. Respondent's defense, rather, was consent, on which the victim's statement had no bearing.

II.

THE BURDEN OF SHOWING INCOMPETENCY OF COUNSEL AND PREJUDICE SHOULD BE PLACED UPON THE DEFENDANT RATHER THAN IMPOSING UPON THE STATE THE SOMETIMES IMPOSSIBLE BURDEN OF PROVING COMPETENCY OF COUNSEL AND LACK OF PREJUDICE.

Those federal judicial circuits which have adopted the *McMann* test do not concur on the standards which compose it. In the instant case, for example, the Fourth Circuit implicitly relied on *Coles v. Peyton,* 389 F.2d 224, 226 (4th Cir. 1968), *cert. denied*, 393 U.S. 849 (1968), wherein the burden of proof was allocated to the State to show lack of prejudice once it had been shown that effective representation has been denied:

> "Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial. An omission or failure to abide by these requirements constitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby." (Footnote omitted.)

See also United States v. DeCoster, 487 F.2d 1197 (D. C. Cir. 1973), which was remanded to the United States District Court, whose decision was reversed in *United States v. DeCoster*, 20 Crim. L. Rep. 2080 (No. 72-1283

D. C. Cir., filed Oct. 19, 1976), discussed in *United States v. Moore*, 554 F.2d 1086 (D. C. Cir. 1976).

It is clear that to allocate such a burden to the State places it in the sometimes impossible position, for example, of proving that a witness, allegedly having exculpatory information pertaining to the crime charged and whose existence allegedly was brought to defense counsel's attention by defendant, did in fact not exist or was without such knowledge. Dissents by the late Judge Craven in *Coles, supra,* and by Judge MacKinnon in both *DeCoster* decisions recognized that such a burden should not be on the State because oftentimes the existence of potential witnesses and knowledge of whether missing evidence would be helpful is peculiarly within defendant's knowledge. *See, e.g., Nick v. United States*, 531 F.2d 936 (8th Cir. 1976), holding that Nick bore the burden of showing that witnesses allegedly not subpoenaed could have been subpoenaed; *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974); *United States ex rel. Green v. Rundle*, 434 F.2d 1112 (3d Cir. 1970).

Furthermore, it is submitted that the Fourth Circuit erred in finding inherent prejudice to the Respondent in the actions of trial counsel. Any such finding should have been made by the trial court, for as this Court suggested in *McMann*, the matter "should be left to the good sense and discretion of the trial courts. . . ." 397 U.S. at 771.

The Fourth Circuit dealt with this matter directly, rather than remanding the case to the District Court for further findings, because the Court found that the material facts were not in dispute nor were such facts completely developed. This approach, however, treats the District Courts as purely fact finding bodies, unable or incapable of applying the law to the facts. Once having enunciated the new standard, it is submitted

that the Fourth Circuit should have returned the case to the District Court for its finding on both the question of the competency of counsel and prejudice to the defendant with the burden of demonstrating both cast on the defendant.

In the context of an alleged denial of due process, this Court has often placed the burden of demonstrating inherent prejudice or harmful error on the defendant, or at least requiring the defendant to make an initial showing of possible prejudice or harmful error. *United States v. Agurs*, 427 U.S. 97 (1976); *Murphy v. Florida*, 421 U.S. 794 (1975); *Chambers v. Maroney*, 399 U.S. 42 (1970).

Finally, by even reaching its substantive conclusion, *viz.*, that Respondent was denied effective assistance of counsel because of the failure to object to the presence of the jury array during the dismissal of an unrelated rape indictment, the Court of Appeals ignored this Court's decision in *Estelle v. Williams, supra.* In *Williams*, while deciding that defendants are entitled to be tried in civilian clothes if they desire, the Court denied relief to the Respondent, reasoning:

> "Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system." 425 U.S. at 512.

Regrettably, this is what the Court of Appeals has done in the present case.

CONCLUSION

As the foregoing discussion indicates, a review of the decision of the United States Court of Appeals for the Fourth Circuit in the instant case directly presents the needed opportunity to declare what test shall be employed to determine the competency of counsel in different stages of a criminal trial and what the criteria of that test are. In addition, the implication that the State bears the burden of proving lack of incompetency and lack of prejudice properly must be dispelled.

For these reasons, Petitioner respectfully urges that a Writ of Certiorari be issued to review the decision in this case of the United States Court of Appeals for the Fourth Circuit. Moreover, this case presents an appropriate vehicle for this Court to give further guidance on the waiver principles of *Williams*.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the Fourth Circuit

No. 76-1946

Victor Dennis Marzullo,
Appellant,
v.
State of Maryland,
Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

BUTZNER, Circuit Judge:

Victor D. Marzullo's appeal from the denial of his application for a writ of habeas corpus raises this question: What is the appropriate standard for determining when criminal defendants have been denied their constitutional right to the effective assistance of counsel? We conclude that the standard applied by the district court is no longer acceptable, and that properly tested, the representation Marzullo received was ineffective.

I.

In considering whether Marzullo had been denied effective assistance of counsel, the district court applied the standard set forth in Root v. Cunningham, 344 F.2d 1, 3 (4th Cir. 1965):

> Ordinarily, one is deprived of effective assistance of counsel only in those extreme instances where the representation is so transparently inadequate as to make a farce of the trial.

The farce and mockery of justice test to which *Root* referred gained wide currency in the era when an accused tried in a state court had no constitutional entitlement to counsel unless he could satisfy the requirements of Betts v. Brady, 316 U.S. 455 (1942).[1] That case compelled him to show circumstances rendering the lack of counsel so "offensive to the common and fundamental ideas of fairness and right" as to deny him due process of law. 316 U.S. at 473. The overruling of *Betts* by Gideon v. Wainwright, 372 U.S. 335 (1963), foretold a different standard for determining counsel's adequacy. Following *Gideon,* courts and commentators recognized that the right to counsel assured by the sixth and fourteenth amendments lacks substance unless counsel is reasonably competent.[2]

We implicitly departed from the farce and mockery test when, in Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968), we imposed specific requirements for counsel's preparation of his client's defense. *Coles* has been cited frequently as offering an improved measure for counsel's performance.[3] Nevertheless, some of our subse-

[1] The right to assistance of counsel at a federal trial was established by Johnson v. Zerbst, 304 U.S. 458 (1938).

[2] *See* Bines, Remedying Ineffective Representation in Criminal Cases: Departure from Habeas Corpus, 59 Va. L. Rev. 927, 934-37 (1973) [hereinafter cited as Bines]; Brody, Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review, 13 Col. J.L. & Soc. Prob. 1, 4-7 (1977) [hereinafter cited as Brody]; Note, Effective Assistance of Counsel : A Constitutional Right in Transition, 10 Valparaiso U. L. Rev. 509, 516-19 (1976).

[3] *See, e.g.,* United States v. DeCoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973); Brody, *supra* note 2, 13 Col. J. L. & Soc. Prob. at 48-49; Comment, Liberal Review of Defense Counsel's Performance: The Normal Competency Test, 1976 U. Ill. L. Forum 407, 415.

quent opinions quoted the older test, and district courts, justifiably relying on them, have continued to apply it.[4] In other instances, we have not referred to that test.[5] Our decisions, however, have been more consistent than reference to the test or lack of it would indicate. Since *Coles,* we have usually judged effective representation by determining whether counsel furnished reasonably adequate services instead of inquiring whether the representation was so poor as to make a farce of the trial.[6] Be that as it may, our ambivalence has persisted long enough. We now expressly disavow the farce and mockery of juctice test which we approved in Root v. Cunningham, 344 F.2d 1 (4th Cir. 1965).

II.

Two years after *Coles,* the Supreme Court decided McMann v. Richardson, 397 U.S. 759 (1970), which dealt with the validity of a guilty plea following a coerced confession. There the Court reiterated that defendants "are entitled to the effective assistance of competent counsel." It explained that a court should not measure the competency of counsel's advice by retrospectively considering whether it was right or wrong. The proper test, the Court stated, is whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." 397 U.S. at 770-71.

Though *McMann* involved an attorney's advice about pleading guilty, many courts have recognized that it provides a suitable general standard for determining whether the representation afforded the accused satisfied his constitutional right to effective counsel. One of the first courts to adopt the *McMann* standard was the

[4] *See, e.g.,* Bennett v. Maryland, 425 F.2d 181, 182 (4th Cir. 1970); Miller v. Cox, 457 F.2d 700, 701 (4th Cir. 1972); Young v. Warden, Maryland Penitentiary, 383 F. Supp. 986, 1009-10 (D. Md. 1974).

[5] *See, e.g.,* United States v. Peterson, 524 F.2d 167, 177 (4th Cir. 1975).

[6] *See, e.g.,* Bennett v. Maryland, 425 F.2d 181, 182 (4th Cir. 1970).

Court of Appeals for the Third Circuit in Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (en banc). Numerous other courts have followed Moore's lead in adopting some version of the normal competency test: United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973); Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974); Williams v. Twomey, 510 F.2d 635, 641 (7th Cir. 1975); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); United States v. Easter, 539 F.2d 663, 665-67 (8th Cir. 1976); *but see* Rickenbacker v. Warden, Auburn Correctional Facility, 550 F.2d 62 (2d Cir. 1976).

We, too, are persuaded that *McMann* furnishes the proper standard for determining the effectiveness of counsel. Therefore, paraphrasing the Court's opinion, we adopt as an appropriate measure: Was the defense counsel's representation within the range of competence demanded of attorneys in criminal cases? *See* 397 U.S. at 771.

By this standard, effective representation is not the same as errorless representation. An attorney may make a decision or give advice which in hindsight proves wrong. Such errors, as *McMann* pointed out, are not necessarily grounds for post-conviction relief. 397 U.S. at 770-71.[7] A convict generally must establish that his counsel's error was so flagrant that a court can conclude that it resulted from neglect or ignorance rather than from informed, professional deliberation.[8]

The *McMann* normal competency standard is similar in many respects to those which judges must apply in

[7] *See also* Moore v. United States, 432 F.2d 730, 737-38 (3d Cir. 1970).

[8] *See* Stone, Ineffective Assistance of Counsel and Post-Conviction in Criminal Cases: Changing Standards and Practical Consequences, 7 Col. Human Rts. L. Rev. 427, 435 (1975). Sometimes, the denial of effective assistance of counsel does not result from neglect, ignorance, or any other fault of defense counsel. For example, a trial court may deprive an accused of effective representation by making a tardy appointment of counsel. *See, e.g.,* Fields v. Peyton, 375 F.2d 624 (4th Cir. 1967).

other contexts.[9] Moreover, because it measures an attorney's conduct by comparison with the competence generally found in the profession, it requires an objective assessment of counsel's adequacy.[10] While the normal competency standard does not purport to list the things counsel should or should not do, it does not preclude resorting to specifics for ascertaining the "range of competence demanded of attorneys in criminal cases." For example, in Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968), we said:

> Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.

We adhere to this statement, for it is a definitive, objective description of the competency normally demanded of counsel in certain aspects of their service.

The normal competency standard is necessarily broad and flexible because it is designed to encompass many different factual situations and circumstances. Consequently, its fair and effective administration rests

[9] The normal competency test bears a close resemblance to the standard set forth in Restatement (Second) of Torts § 299A (1965), for professional competence:

> Undertaking in Profession or Trade
> Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

See, generally, Bines, *supra,* note 2, 59 Va. L. Rev. at 937.

[10] *See* Bines, *supra* note 2, 59 Va. L. Rev. at 938-39.

primarily on the district judges. Speaking for the Court in *McMann* on this subject, Mr. Justice White said:

> [W]e think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts. 397 U.S. at 771.

In exercising its discretion, a trial court may refer to other sources to determine the normal competency of the bar. Among these are precedent from state and federal courts, state bar canons, the American Bar Association Standards Relating to the Defense Function [App. Draft 1971], and in some instances, expert testimony on the particular conduct at issue. These, of course, do not supplant the test that we have prescribed, but they can aid in objectively ascertaining the range of competency normally expected of attorneys practicing criminal law.

III.

Although this appeal was not heard en banc, all of the judges of the court approve Parts I and II.

IV.

We now apply the normal competency standard to Marzullo's claim of ineffective representation.

The Public Defender named an attorney to represent Marzullo in the Circuit Court of Baltimore, Maryland, where he had been charged in separate indictments with raping two women. Shortly after the appointment, Marzullo complained in a letter to the trial judge about the lawyer: "The impression he gave me by talking to him, I really don't think for one minute he is going to try and defend me adequately except to go through the formalities of my trial." The court denied Marzullo's

request for a substitute, and subsequently, Marzullo alleged many deficiencies in the representation he received. We believe that only his complaint about the selection of the jury merits discussion.

When the first rape case was called for trial, the prosecuting witness told the judge, in the presence of the jurors, that she could not identify Marzullo as her attacker because she did not see his face. The prosecutor responded that she had previously said she could identify him, but the case was dismissed with the State's consent.

The prosecutor then announced that the State was ready to proceed on the second indictment charging Marzullo with rape, assault with intent to rape, common law assault, statutory mayhem, and perverted sexual practice. Marzullo was arraigned and pled not guilty. The court, observing that only 19 jurors were present, noted that this was insufficient to allow all peremptory challenges.[11] The prosecutor said the state would waive its challenges, and Marzullo's attorney stated, "If Your Honor please, my client advises me he believes we would end up with 12 jurors out of that many even with the challenges."

The jury panel was sworn and the court conducted the following voir dire:

> The Court: The first question is: Each of you heard, I am sure, what I said about being advised by the State's attorney that neither of these girls could identify the alleged assailant. You have also observed the fact that Ms. Yingling openly stated in Court she could not identify him, or he was not the man. So that the case was confessed not guilty. There was a conversation between the other girl and the State's Attorney obviously indicating that young lady believes she can identify the defendant. Would that fact in any way affect your ability to render a fair and impartial verdict in this case?

[11] Marzullo was entitled to 20 peremptory challenges under Maryland law. *See* Annot. Code of Md., Courts and Judicial Proceedings, § 8-301 (1974).

(No response.)

The Court: Would you base your verdict solely on what you hear from the witness stand?

(No response.)

The Court: Is there any juror who feels she or he cannot render a fair and impartial verdict, in view of what has taken place in Court this morning?

(No response.)

The Court: The answers to all the foregoing questions are in the negative.

The jury was then impanelled, ten minutes after court had convened.

The evidence discloses that Marzullo and the prosecuting witness, an 18-year-old married woman, met at the home of a mutual friend. Marzullo offered to drive the woman to the home of another friend. They left with Marzullo's girlfriend whom they soon dropped off. For the next several hours Marzullo and the woman drove around, making a few stops and eventually parking at a secluded spot in the country.

The woman testified that Marzullo threatened to kill her, wounded her with a knife, forced her to disrobe, raped her, and compelled her to commit fellatio. She said that after she dressed, she fled in fear and asked some people in a nearby car to take her to a friend's house in Baltimore.

Marzullo testified that after they parked the woman kissed him, they both voluntarily disrobed and got in the back seat where she willingly committed fellatio. He denied threatening her or wounding her, or having intercourse with her. He claimed she left his car because as they were about to drive away they got into an argument and he slapped her.

Approximately five hours elapsed from the time the woman started out with Marzullo until she complained to the police. A medical examination revealed minor cuts and abrasions, but no sign of vaginal penetration

or sperm. The police later found a knife in Marzullo's car.

The jury convicted Marzullo of assault with intent to rape and of perverted practices. The court sentenced him to 10 years on the first charge and to a concurrent sentence of 5 years on the second. After exhausting his state remedies, Marzullo petitioned for a writ of habeas corpus in the district court.

Relying on the state trial and post-conviction records, the district judge denied relief. He held that since Marzullo and his counsel were aware that the jurors were present when the first indictment was dismissed, the failure of counsel to object resulted in a waiver of the right to collateral relief. He noted that Marzullo himself made no objection when his lawyer assured the court that a jury could be selected, and he characterized the lawyer's conduct as a permissible trial tactic.

The district judge's decision rested in large part on his justifiable reliance on our adherence to the farce and mockery test to which he expressly referred. If the material facts were in dispute or incompletely developed, we would remand the case for reconsideration in the light of the standard that we adopted in Part II of this opinion. But here the attorney's conduct at the voir dire and the jury's exposure to the proceedings involving the first indictment are undisputed matters of record. We believe therefore that a remand for an evidentiary hearing on the habeas corpus petition is unwarranted.

Before the trial, Marzullo's attorney learned at a bench conference that the State could not proceed on the first indictment. There is no doubt that he also was aware of the conflicting accounts as to what took place in the parked car, and he should have realized that the defense rested almost entirely on the jury's acceptance of Marzullo's testimony. The information about the first rape charge had no probative value and could only serve to discredit Marzullo; therefore, it was important to withhold from the jury all prejudicial reference to it.

Nevertheless, the attorney did not move to exclude the jury during the interrogation of the prosecuting witness about the crime charged in the first indictment.

Furthermore, the attorney's conduct at the voir dire again failed to protect Marzullo from the prejudicial effects of the jury's exposure to the first rape charge. Before the jurors were even questioned, he assured the court that a panel could be selected. At that time, he could not possibly have known that the colloquy about the first indictment did not bias any of the jurors. Furthermore, he never asked the court to instruct the jury that remarks about the dismissed rape charge could not be considered in their deliberation about the second indictment.

The state's defenses in the habeas proceeding of waiver and trial tactics are not supported by the records of either the state trial or the post-conviction hearing. Before the trial, Marzullo's attorney explained the procedure for striking the jury, but there is no evidence that he advised Marzullo of his right to have the proceedings about the first indictment conducted in the absence of the jury. Without proof that Marzullo knew his rights, waiver cannot be presumed. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Furthermore, at the post-conviction hearing, Marzullo's attorney made no claim that his decision not to challenge the jury was a trial tactic. On the contrary, he testified that according to his recollection, the jury had not been present when the prosecuting witness stated she could not identify Marzullo. His explanation is clearly refuted by the record, particularly by the trial judge's observation during the voir dire about the jury's presence.

As we noted in Part II, the ABA Standards Relating to the Defense Function (App. Draft 1971) do not provide a test for determining whether an accused has received effective representation. They do however, furnish a reliable guide for determining the responsibilities of defense counsel, including those related to the

selection of the jury.[12] We conclude that Marzullo's attorney failed to discharge his duty effectively by not moving to exclude the jury while the first indictment was dismissed, and then by foregoing Marzullo's peremptory challenges before any voir dire examination. His actions exemplified his perfunctory approach to the important task of selecting an unbiased jury. We are persuaded that his representation of Marzullo with respect to this aspect of the case was outside the range of competence expected of attorneys in criminal cases.

The judgment of the district court is reversed, and this case is remanded with instructions to issue a writ of habeas corpus discharging Marzullo from custody unless the State retries him within a reasonable time.

[12] ABA Standards Relating to Defense Function (App. Draft 1971) provides:

> § 5.2(b) The decisions on . . . what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.
>
> § 7.2(a) The lawyer should prepare himself prior to trial to discharge effectively his function in the selection of the jury, including the raising of any appropriate issues concerning the method by which the jury panel was selected, and the exercise of both challenges for cause and peremptory challenges.

APPENDIX B

In The United States District Court
For The District of Maryland

Victor Dennis Marzullo
v.
State of Maryland

Civil No. Y-75-1877

MEMORANDUM AND ORDER

On July 22, 1974, petitioner was indicted for rape in the Circuit Court for Baltimore County. He was arraigned and pleaded not guilty on the day trial began, October 10, 1974. A jury found petitioner guilty of assault with intent to rape and perverted practice. He was sentenced to ten years confinement for assault with intent to rape and a concurrent five years confinement for perverted practice.

On October 28, 1974, petitioner appealed to the Court of Special Appeals of Maryland alleging:

1.) Insufficiency of evidence to convict for either offense.

2.) Failure of the trial court to advise petitioner of a right to file a motion for a new trial.

3.) His sentencing prior to the expiration of time within which he could file a motion for a new trial denied him due process and equal protection.

4.) Acquittal of rape but conviction of assault with intent to rape were inconsistent verdicts.

On May 12, 1975, the Court of Special Appeals of Maryland affirmed the judgment of the trial court in an unreported *per curiam* opinion. The Court of Appeals of Maryland denied petitioner's application for a writ of certiorari on August 1, 1975.

Petitioner filed for relief under the Maryland Uniform Post Conviction Act on May 23, 1975. Petitioner's post conviction petition contained 40 numbered paragraphs with numerous lettered subsections. On August 14, 1975, a hearing was held before the Honorable Walter R. Haile. In a memorandum and order dated September 4, 1975, Judge Haile denied relief. Petitioner's application for leave to appeal from Judge Haile's decision was denied by the Court of Special Appeals on September 24, 1975.

In his petition for habeas corpus relief in this court petitioner has incorporated his post conviction petition by reference and added a seventeen page repetitious hodge podge of allegations, arguments and citations of cases from which this court has been able to distill the following alleged grounds for relief:

1.) Illegal arrest.

2.) Illegal search and seizure.

3.) Perjury by State's witnesses.

4.) Failure of trial judge and attorney to advise him of his right to file a motion for new trial.

5.) Inconsistency of jury verdicts.

6.) Insufficient evidence to convict.

7.) Incompetency of counsel for the following reasons:

a. Failure to sequester witnesses.

b. Failure to subpoena witnesses.

c. Forced defendant to testify by failure to call other witnesses.

d. Failure to properly question jurors on voir dire.

e. Failure to advise petitioner of number of peremptory challenges and challenges for cause.

f. Failure to call expert to testify concerning cuts on victim.

g. Failure of attorney to file appeal.

h. Exclusion of petitioner from bench conferences.

8.) Trial judge was biased.

9.) Trial judge refused to appoint another attorney on petitioner's request.

10.) Failure of state to administer lie detector test to petitioner.

11.) Jury improperly instructed that victim's testimony need not be corroborated.

The State, in its answer, suggests that the entire petition should be dismissed for failure to exhaust state remedies on all contentions. The law of this circuit is that the district court must consider those contentions for which state remedies have been exhausted even though the petition contains other contentions for which state remedies have not been exhausted. *Hewett v. North Carolina*, 415 F.2d 1316, 1320 (4th Cir. 1969); *Jenkins v. Fitzburger*, 440 F.2d 1188 (4th Cir. 1971). The principle of exhaustion of state remedies is a matter of comity not of jurisdiction. *Picard v. Connor*, 404 U. S. 270, 275 (1971). Thus, exhaustion is not a necessary antecedent to this court's power to dismiss claims lacking merit. *Jenkins v. Fitzburger, supra.* Accordingly, this court will consider all of the foregoing allegations.

I.

Illegal Arrest

Petitioner does not allege nor does the record disclose that any evidence was obtained from the petitioner as a result of the alleged illegal arrest. No statement of petitioner was offered against him, nor was there any

physical evidence taken from him at the time of his arrest. An illegal arrest standing alone does not entitle a petitioner to habeas corpus relief. *Bobbit v. Warden*, 350 F. Supp. 768 (D. Md. 1972). *See also, Smith v. United States*, 277 F. Supp. 850 (D. Md. 1967), *aff'd*, 401 F.2d 773 (4th Cir. 1968). Furthermore, the facts show that the victim identified the petitioner to the police as the person who had raped her. (Tr. 104-106). After her identification petitioner was placed under arrest. Clearly there was probable cause to arrest the petitioner. A police officer in Maryland may arrest a person without a warrant if he has probable cause to believe a felony has been committed and that the person to be arrested committed it. *MD. ANN. CODE*, art. 27, § 594B(c). The arrest was legal.

II.

Illegal Search And Seizure

Petitioner claims that the search and seizure of his car was illegal and that the pictures of the car, the knife, clothing and welder's hood taken from the car should not have been admitted into evidence at his trial.

Detective Corporal Robert Thompson of the Baltimore County Police testified that after receiving the report of the rape from the lieutenant at Wilkins Station he proceeded to that station where, after waiting for the victim to return from the hospital, he read the hospital report and interviewed the victim. She gave him a description of the rapist and the car which he was driving. The car was described as a black convertible, possibly with Pennsylvania tags, in poor shape, with the rear window missing. She further told him that the vehicle contained a pair of blue trousers, a blue shirt, a towel and a welder's hood. (Tr. 102). After noting that the physician's report indicated signs of trauma he asked the victim if she would show him her abdomen, which she did. He noted 12 small wounds and one slashing wound on her abdomen. The victim was

depressed and frightened at the time of this interview. (Tr. 104). The victim told Corporal Thompson that she had met her assailant at a friend's house and that the assailant was supposed to be taking her home when the attack occurred. Thereafter, Corporal Thompson dispatched a police car to the home of the people that the victim had been visiting to determine the identity of the person with whom the victim had left. After learning petitioner's name and address, Corporal Thompson took the victim to the area of petitioner's residence and, after failing to locate the vehicle at that address, went to the area of the 200 block of Broadway in Baltimore City. There the victim pointed out the vehicle in which the rape had occurred and which had been used to transport her to the wooded area in Baltimore County where the rape occurred. (Tr. 105). At that point, Corporal Thompson obtained the assistance of Baltimore City Police and went to petitioner's former wife's apartment where he found petitioner, his former wife, and some other people. Thompson asked petitioner to step outside with him, which petitioner did. Petitioner was immediately identified by the victim as the man who had raped her. (Tr. 105-106). Thompson then placed petitioner under arrest and looked in the petitioner's convertible which was parked in front of the apartment with the top down. He observed in plain view a pair of blue trousers, a welder's hood, and a knife stuck down on the side of the driver's seat. (Tr. 107). At his post conviction hearing, petitioner admitted that the knife was visible from outside the car when the top was down. (P.C.Tr. 71).

The foregoing factual recitation makes it clear that there was no illegal search and seizure. The car, which was an instrumentality of the crime, was plainly visible to the officer, as was the knife, welder's hood and blue trousers as described by the victim. The victim also positively identified the knife as the one used in perpetrating the rape. (Tr. 107). A police officer has a right to seize evidence in plain view from a position where the officer has a right to be. Clearly this officer

had a right to be on the public street. *See, Weaver v. Williams*, No. 74-1608, (4th Cir., decided Jan. 20, 1975), slip opinion p. 4. Even if the discovery of the objects inside the car were considered to have been discovered as a result of a search, such a search would be legal because there were clearly "exigent circumstances" justifying the officers in not waiting to get a warrant. Petitioner's ex-wife and friends were present in the area, the car was unlocked with the top down on a public street. *See, Chambers v. Maroney*, 399 U. S. 42, 48-51 (1970). There was no illegal search and seizure.

III.

PERJURY BY STATE'S WITNESSES

Although petitioner alleges that the state's witnesses perjured themselves in various ways (see pages 9-10 of petition) he does not allege that the State knowingly used perjured testimony. A habeas corpus petitioner is not entitled to relief unless he alleges and proves that the State knowingly used false testimony. *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964); *Napue v. Illinois*, 360 U. S. 264 (1959); *Harrison v. Boles*, 307 F.2d 928, 933 (4th Cir. 1962). The resolution of conflicts in the testimony of witnesses, even in the testimony of the same witness is clearly a matter within the exclusive province of the jury. All of the testimony complained of herein and petitioner's own testimony were before the jury. In *White v. United States*, 279 F.2d 740 (4th Cir. 1960), the petitioner attacked the testimony of four witnesses. He argued "the roles of grudgebearers, felons, army deserters, liars and false martyrs to the cause of justice cannot be accepted without doubt by reasonable men." The Fourth Circuit said:

> . . . we need cite no authority to support the age-old proposition that it is for the jury, not the court, to pass upon and determine the credibility of the witnesses and to attach to their testimony the weight to which it is entitled under all the circumstances appearing from the evidence. (279 F.2d at 747).

All of the inconsistencies pointed out by petitioner were before the jury. The jury resolved those conflicts by their verdict. There is no merit to this contention.

IV.

Failure Of Trial Judge And Defense Counsel To Advise Petitioner Of His Right To File A Motion For New Trial

Petitioner claims he was not advised of his right to file a motion for new trial within three days. Petitioner filed a motion for new trial, but it was denied because it was filed too late. No statute or rule of court in Maryland imposes any duty on the courts to advise a defendant that he has a right to file a motion for new trial. *Marzullo v. State*, No. 950, Sept. term 1974. (Respondent's Ex. 2).

Claims, such as this one, relating to collateral proceedings and not attacking the conviction itself, are not cognizable on habeas corpus. *Noble v. Sigler*, 351 F.2d 673, 678 (8th Cir. 1965), *cert. denied*, 385 U. S. 853; *Stokley v. Maryland*, 301 F. Supp. 653, 657 (D. Md. 1969).

V.

Inconsistency Of Jury Verdicts

Petitioner claims that he could not be convicted of assault with intent to rape and acquitted of rape. Such a contention is clearly frivolous. Rape and assault with intent to rape are two separate and distinct offenses and acquittal of rape does not preclude conviction of assault with intent to rape. Consistency in verdicts is not required in any event. *Hamling v. United States*, 418 U. S. 87, 101 (1974); *United States v. Dotterweich*, 320 U. S. 277, 279 (1943). "Implicit contradiction in the verdict is not a fatal defect." *United States v. McCloud*, 427 F.2d 242 (4th Cir. 1970). Even if the verdicts had been inconsistent such inconsistency would not amount to constitutional error entitling petitioner to habeas corpus relief. *Henzel v. Florida*, 475 F.2d 1271, 1272 (5th Cir. 1973).

VI.

Sufficiency Of Evidence

In the instant case the victim identified petitioner as the one who had raped her and forced her to perform a perverted sex act. (Tr. 104-106). She also identified his car and the knife he used to threaten her. (Tr. 107). Petitioner admitted to having "oral sex" with the victim at the time and place that the victim had testified to, but denied using force or having intercourse with the victim. Sufficiency of the evidence is not reviewable on habeas corpus. Habeas corpus relief is only available when the conviction is "so totally devoid of evidentiary support as to raise a due process issue." *Grundler v. North Carolina*, 283 F.2d 798, 803 (4th Cir. 1960). The previous recitations of trial testimony clearly demonstrate that this petitioner's conviction was not totally devoid of evidentiary support as to entitle him to habeas corpus relief.

VII.

Incompetency Of Counsel

Petitioner claims that his counsel was incompetent in that he failed to sequester witnesses, and failed to subpoena witnesses that petitioner had requested thereby forcing petitioner to testify in violation of his Fifth Amendment right.

At the outset it should be noted that there is a presumption that counsel properly performed his duties. *Brown v. Smith*, 271 F.2d 227 (4th Cir. 1969); *Budd v. United States*, No. M-74-1190 (D. Md., decided Feb. 2, 1976). For federal habeas corpus purposes:

> Ordinarily, one is deprived of effective assistance of counsel only in those extreme instances where the representation is so transparently inadequate as to make a farce of the trial.

Root v. Cunningham, 344 F.2d 1, 3 (4th Cir. 1965).

Petitioner's counsel testified at the post conviction hearing that he did not move to sequester the witnesses

because their stories basically matched petitioner's story up to the point of the actual attack and that none of the witnesses could testify as to the actual attack. Counsel therefore saw no reason to have them sequestered. (P.C. Tr. 10-11). Counsel also testified that he had interviewed the witnesses that petitioner had requested with the exception of Carolyn Baughman whom he was unable to locate, and that none of them were helpful to petitioner's cause. (P.C.Tr. 8). Mrs. Baughman testified at the post conviction hearing. She also was unable to testify as to the actual occurrence, but said that when she last saw the petitioner and the victim between 5:00 and 6:00 p.m. that the victim was acting "tipsy to me or goofy". (P.C.Tr. 47). She also admitted that she was herself tipsy. (P.C.Tr. 48). The attack occurred at approximately 9:00 p.m. (Tr. 65-66). The insubstantial nature of this witness' testimony makes it clear that it was not an error of constitutional dimension in failing to call her. The error, if any, was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U. S. 18 (1967); *Harrington v. California*, 395 U. S. 250 (1969).

Petitioner was fully advised of his right to testify or not testify by his attorney. (Tr. 119). His defense was consent. None of the other witnesses was present at the scene of the attack so that none of them could have testified concerning the victim's consent. The only way he could present such evidence was through his own testimony. The contention that his attorney forced him to testify is clearly frivolous.

Petitioner further alleges that his attorney was incompetent because he failed to properly question the jury on voir dire, failed to advise him of the number of peremptory challenges available, and that he had unlimited challenges for cause and failed to include him in bench conferences. Petitioner, of course, had 20 peremptory challenges in this case. Since the panel consisted of only 19 prospective jurors petitioner could have eliminated them all if he had had any reason to do so. The record shows the following colloquy concerning the challenges: (Tr. 5)

> THE COURT: We are short on jurors. How many have you counted?
>
> THE CLERK: Nineteen, Your Honor, on our panel.
>
> THE COURT: We have 19 jurors. You're entitled, of course, to 20 peremptory challenges which means you won't have any left.
>
> MR. SEIBERT: As far as the State is concerned, Your Honor, we will waive any challenge and take the first 12 jurors.
>
> MR. ARNICK: If Your Honor please, my client advises me he believes we would end up with 12 jurors out of that many even with the challenges.

In any event petitioner relied on his counsel to handle these matters and made no objection at the time. When a client by his actions confesses his inadequacy to handle his case and places himself in counsel's hands he is bound by counsel's decisions. *Williams v. Beto*, 354 F.2d 698, 705-6 (5th Cir. 1966). The same rule applies to petitioner's exclusion from bench conferences. (P.C.Tr. 82-83). The contention that counsel was incompetent because he failed to call an expert to testify as to the cuts on the victim's abdomen is frivolous. Indeed petitioner admitted that he knew of no way that a physician could have determined what made the marks on the victim's abdomen. (P.C.Tr. 74). Counsel are called upon to make decisions such as these throughout the course of a trial and the courts will not second guess counsel on his trial tactics. As the Court held in *United States v. Rubin*, 443 F.2d 442, 445 (5th Cir. 1970), *cert. denied*, 401 U. S. 945 (1970);

> Errors, even egregious ones, in this respect [trial tactics] do not provide a basis for post conviction relief.

Petitioner's real complaint is merely that counsel did not obtain an acquittal on all charges. (P.C.Tr. 83).

Petitioner alleges that his attorney failed to file an appeal. There is no merit to this contention since his

appeal was filed, considered, and ruled upon by the Maryland Court of Special Appeals. (Respondent's Ex. 2).

VIII.

TRIAL JUDGE WAS BIASED

IX.

TRIAL JUDGE REFUSED TO APPOINT ANOTHER ATTORNEY ON PETITIONER'S REQUEST

Petitioner wrote to Judge Proctor expressing dissatisfaction with his appointed counsel after his initial conference at the Baltimore County Jail. Judge Proctor refused to appoint new counsel and petitioner concluded that the judge was, therefore, biased against petitioner. (P.C.Tr. 72-73). Petitioner has pointed to no other action or inaction on Judge Proctor's part which would in any way indicate bias.

An indigent has no right to counsel of his choice. Judge Proctor appointed competent counsel and indeed petitioner admitted that until the return of the verdict he felt that counsel had done a good job. (P.C.Tr. 83). Judge Proctor had no duty to appoint new counsel simply because petitioner requested it. *Thacker v. Slayton*, 375 F. Supp. 1332, 1336 (E.D. Va. 1974).

An independent review of the record by this court discloses not a scintilla of evidence to support a claim of bias on Judge Proctor's part. In any event "it is not what the Judge may think of the defendant . . . but that he keep his opinion to himself and rule as a judge . . ." *United States v. Mraz*, 136 F.2d 221, 225-26, n. 4 (7th Cir. 1943). *See also, Walker v. Bishop*, 408 F.2d 1378, 1381 (8th Cir. 1969). This Judge Proctor clearly did.

X.

FAILURE OF STATE TO ADMINISTER LIE DETECTOR TEST TO PETITIONER

There is no constitutional right to take a lie detector test. Indeed, the results of such a test are not even admissible in evidence under Maryland law. *Smith v. State*, 318 A.2d 569, 579 (Md. 1974); *Rawlings v. State*, 256 A.2d 704, 705-6 (Md. 1969); *Hyde v. Warden*, 202 A.2d 382, 384 (Md. 1964); *Lusby v. State*, 141 A.2d 893, 895 (Md. 1958). There is no merit to this contention.

XI.

JURY IMPROPERLY INSTRUCTED THAT VICTIM'S TESTIMONY NEED NOT BE CORROBORATED

There is no constitutional necessity for corroboration of a victim's testimony. The cases are replete with instances of conviction on the testimony of the victim. Whether the instructions were erroneous or not is a matter "of state law and procedure not involving federal constitutional issues." It is not the duty, nor indeed is it within the power, of this court to serve as an additional appeal forum. The only concern of this court when considering a habeas corpus petition is whether circumstances exist which impugn fundamental fairness or infringe upon specific constitutional rights. *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir. 1960). The instruction did not violate petitioner's constitutional rights.

XII.

ADMISSION OF PHYSICIAN'S REPORT WITH ILLEGIBLE SIGNATURE

The report in question was admitted into evidence in open court in petitioner's presence by stipulation. (Tr. 117-118). The right to confront accusers may be waived like any other. In *Wilson v. Gray*, 345 F.2d 282, 286-87 (9th Cir. 1965), the Court said:

> It has been consistently held that the accused may waive his right to cross-examination and confron-

> tation, and that the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics. (citations omitted).

This proposition was recognized by the Fourth Circuit in *United States v. Costanzo*, 395 F.2d 441, 443 (4th Cir. 1968). Often in jury trials counsel do not wish to appear hypertechnical. This tactic is used to keep the jury from becoming impatient with counsel and his client. *See also, Henry v. Mississippi*, 379 U. S. 443, 451 (1965).

XIII.

Failure Of Trial Judge To State Reasons For Granting Directed Verdict On Count Four Was Error

To state the above proposition is to refute it. Petitioner was entitled to dismissal of count four and he got it. This contention is frivolous. This allegation at best amounts to nothing more than a violation of state procedure which is not reviewable on federal habeas corpus. *Grundler, supra.*

XIV.

Presence Of Jury Members In Court When Unrelated Rape Indictment Against Petitioner Was Dismissed

While the jury members were present in the courtroom the Assistant State's Attorney dismissed another rape indictment against petitioner because the complaining witness could not identify him. Thereafter, on voir dire, Judge Proctor specifically asked the jurors whether or not such knowledge would prevent them from giving petitioner a fair trial. No juror indicated that he or she would be affected in any way by the knowledge of the dismissal. (Tr. 6). Petitioner was clearly entitled to have such questions asked on voir dire. If he were not satisfied with the jurors he had enough peremptory challenges to dismiss them all. In any event he is deemed to have waived any right he may have had to challenge the panel by not presenting his reasons to the trial court and giving that court an opportunity to act.

Petitioner and his counsel were aware of the presence of the jurors and made no objection, thereby waiving any right to collateral relief. *See, Estelle v. Williams,* ___ U. S. ___ (1976), No. 74-676 (decided May 3, 1976).

XV.

Failure Of Attorney To Speak On Petitioner's Behalf At Sentencing

After the jury had returned its verdict the following colloquy took place: (Tr. 177)

> THE COURT: Mr. Arnick, is there anything you or your client wishes to say before I impose sentence in this case?
>
> MR. ARNICK: He indicates he does not have anything further to add, Your Honor.

The Court had just heard the case against the petitioner and had heard his attorney's closing argument which was not reported. When, after consulting with the accused, the attorney chose not to speak further and when the accused indicated that he had nothing further to say the right to allocution was effectively waived. *See, Henry v. Mississippi, supra.*

In conclusion, it appears that all of petitioner's complaints about his counsel and his trial amount to nothing more than disappointment at the verdict. (P.C.Tr. 83).

> While a defendant is undeniably entitled to a fair trial according to the law of the land, yet he is not entitled to a perfect one. And where an attorney gives his client his complete loyalty and serves his cause in good faith and to the best of his ability, the due process requirement for effective assistance of counsel is generally met.

Root v. Cunningham, 344 F.2d 1, 3 (4th Cir. 1965).

This petitioner's trial, while not perfect, was fair. He is entitled to no more.

Accordingly, it is this 14th day of July, 1976, by the United States District Court for the District of Maryland, ORDERED:

1.) That the petition for habeas corpus be, and the same is hereby, DENIED.

2.) That the Clerk mail copies of this Memorandum and Order to the petitioner and to the Attorney General of Maryland.

JOSEPH H. YOUNG,
United States District Judge.